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Channel Twenty Television Company, L.L.C. and Issac Max Jaramillo v. Gary A. Spire dba Hokeiko Broadcasting Company : Reply Brief

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

CHANNEL TWENTY TELEVISION
COMPANY, L.L.C. and ISAAC MAX
JARAMILLO,

Plaintiffs-Appellants,

vs.

GARRY A. SPIRE dba HOKEIKO
BROADCASTING COMPANY,

Defendant-Appellee.

No. 20000074-CA

Oral Argument Requested

APPELLANTS' REPLY BRIEF

Appeal from the Third Judicial District Court of
Salt Lake County, State of Utah
Honorable Homer F. Wilkinson, District Judge, Presiding

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FILED

AUG 10 2000

COURT OF APPEALS

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ARGUMENT

I. THE SETTLEMENT AGREEMENT WAS NOT ILLUSORY.

In his appellate brief, Hokeiko raises a patently frivolous contention that until all condition precedents to payment, as outlined in § 3 of the Settlement Agreement had been met, all obligations and rights set forth in the agreement were illusory. This argument is raised as an alternative to support the ruling by the trial court that an agreement existed between the parties, but that Hokeiko had the right to terminate, notwithstanding FCC approval of the Settlement Agreement.

The narrow question raised by this contention is whether, by § 3, the parties intended that the existence of the Settlement Agreement in its entirety, was conditioned upon the occurrence of all the condition precedents noted in § 3. Section 3 of the Settlement Agreement clearly refers to the condition precedents that give rise to payment by CTTC of the settlement amount (\$65,000). Reading § 3 broadly, as Hokeiko argues, to mean that the entire agreement was premised on the occurrence of the condition precedent contradicts the fundamental nature and purpose of the agreement. Contracts "should be read as a whole, in an attempt to harmonize and give effect to all of the contract provisions." ELM, Inc. v. M.T. Enters., Inc., 968 P.2d 861, 863 (Utah Ct. App. 1998) (citing Nielsen v. O'Reilly, 848 P.2d 664, 665 (Utah 1992)).

Contrary to Hokeiko's interpretation of the Settlement Agreement, the agreement clearly and unequivocally creates affirmative obligations of the parties that arise immediately upon execution of the agreement, including specifically the following obligations:

1. The parties are required to jointly petition the FCC for approval of the Settlement Agreement (Settlement Agreement, §§ 1, 4);
2. Hokeiko is required to request the dismissal with prejudice of his pending application (Settlement Agreement, § 4);

3. The parties were required to use their best efforts and cooperate to seek final commission approval of the Settlement Agreement (Settlement Agreement, § 4);

4. Hokeiko agreed not to take any action to impede or frustrate the eventual grant of the CTTC application (Settlement Agreement, § 4); and

5. Both parties were to maintain the confidentiality of the terms of the Settlement Agreement pending the filing of the joint petition (Settlement Agreement, § 5).

Hokeiko's present interpretation of § 3 of the Settlement Agreement expressly contradicts the acknowledgment in § 8 of the Agreement that "this Settlement Agreement is a legally binding obligation of such Party and is enforceable against such Party in accordance with its terms."

Hokeiko's interpretation of the Agreement squarely contradicts the enforcement provisions outlined in paragraph 6:

6. In the event of default by one Party in the performance of the obligations imposed upon the Parties to this Settlement Agreement, the other Party shall be entitled to pursue any remedies for redress of injuries from such a default that are available at law or in equity or otherwise, including reasonable attorneys' fees and court costs incurred in enforcing this Settlement Agreement. In addition, Hokeiko acknowledges that CTTC has no adequate remedy at law. If Hokeiko shall fail to perform any of its obligations hereunder, and Hokeiko confirms and agrees that CTTC's rights to specific performance are essential to protect CTTC's rights and interests. Accordingly, Hokeiko hereby agrees that, in addition to whatever remedy CTTC may elect to pursue, CTTC shall have the right to such specific performance of this Settlement Agreement, and Hokeiko agrees to waive the defense that CTTC has an adequate remedy at law and to interpose no objection, legal or otherwise, to the propriety of specific performance as a remedy.

Moreover, this interpretation raised the obvious question: If the Settlement Agreement had not yet come into legal existence, why did Hokeiko's even bother to send notice to CTTC, and to the FCC of his intent to terminate the Settlement Agreement upon ten days notice? The answer is that this proffered interpretation has no basis in the parties' intent, but is a frivolous attempt by Hokeiko's present counsel to justify Hokeiko's belated termination of the Settlement Agreement.

In his brief, Hokeiko argues that CTTC should not be permitted to address this issue in its reply brief. The trial court, however, did not conclude that the entirety of the Settlement Agreement was illusory, but rather that the Agreement had in fact been terminated by Hokeiko pursuant to the termination clause of the Settlement Agreement. Since Hokeiko has raised this frivolous contention of its interpretation of condition precedent as an alternative grounds for upholding the trial court's ruling, this reply brief is the appropriate time for CTTC to address the issue. It is not CTTC's obligation in its opening brief to anticipate and rebut the alternative grounds that Hokeiko believes support the trial court's ruling, particularly when the argument is patently frivolous.

II. THE SETTLEMENT AGREEMENT IS NOT AMBIGUOUS.

In the trial court below, the parties presented two alternative, and contradictory interpretations of § 13 of the Settlement Agreement, with both parties premising summary judgment on their contention that their interpretation was the only reasonable interpretation. In his brief, Hokeiko contends that CTTC's appeal should be denied because is now premised on a contradictory assertion that the Settlement Agreement is ambiguous. Nonsense. CTTC does not, and has never taken the position that the Settlement Agreement is ambiguous. CTTC contends now and below, that the Settlement Agreement is not ambiguous because the interpretation it offers to § 13 was the only reasonable construction. Accordingly, this appeal is grounded in the contention that since there is only one reasonable interpretation (the one offered by CTTC), the trial court erred by failing to grant CTTC summary judgment as a matter of law.

As a separate issue, CTTC also points out that the trial court erred because it granted summary judgment in favor of Hokeiko, when it adopted the interpretation of Hokeiko as being "more reasonable" than the interpretation offered by CTTC. Hokeiko does not dispute the legal premise that the trial court does not have the authority on summary judgment to choose between

two reasonable but contradictory interpretations of a contract. Rather, Hokeiko makes a technical argument that CTTC failed to preserve an “ambiguity” argument for purposes of this appeal. In substance, Hokeiko contends that when both parties presented what they consider to be the only reasonable interpretation of § 13 of the Settlement Agreement, that both parties somehow acquiesced in giving the trial court authority to pick which interpretation it considered the “most reasonable” interpretation.

The contention by Hokeiko that CTTC waived this issue on appeal is erroneous. Below, CTTC did not advocate that its construction was “more reasonable” than the one offered by Hokeiko, nor did CTTC contend that the trial court had the authority on summary judgment to determine which construction offered was most reasonable. Likewise, nowhere below did Hokeiko argue that the trial court had the authority to offer an interpretation of a contract on summary judgment which was susceptible to two reasonable interpretations. In short, the scope of the trial court’s authority to interpret an ambiguous contract on summary judgment was never an issue below.

In responding to Hokeiko’s Motion for Summary Judgment, CTTC presented what it believed to be a reasonable interpretation of § 13 of the Settlement Agreement. The trial court could not, and should not have granted summary judgment in favor of Hokeiko without concluding that the interpretation presented by CTTC was not reasonable, as a matter of law.

III. HOKEIKO DOES NOT RECONCILE ITS INTERPRETATION WITH THE PARTIES’ EXPECTATION AND INTENT.

In his brief on appeal, Hokeiko goes to great length to examine in minute detail the language of § 13 of the Settlement Agreement. Hokeiko even comes to the conclusion that the use of a semicolon was a grammatical mistake, that could be cleared up by treating the semicolon as a comma. Likewise the trial court found it helpful to rewrite the language of § 13 by adding a

second “within 12 months” clause to the agreement in order to give the provision the meaning advocated by Hokeiko. Lost within all this analysis, both by Hokeiko and by the trial court, was how their proposed construction and reconstruction of § 13 of the Settlement Agreement is consistent with the intent of the parties, as manifested by the overall purpose of the agreement.

For example, Hokeiko never explains why the parties would want to impose the same twelve month deadline for securing both the initial and final approval, when the events cannot occur simultaneously, but must occur serially, with finality occurring no sooner than 45 days after the initial approval occurs. It simply makes no sense to impose the same twelve month time limit on both approval and finality.

Hokeiko never explains why the parties would want to preserve the right to terminate once the FCC granted initial approval and pending finality. At that point, the rights of the parties are materially and fundamentally altered. Once approval occurred, Hokeiko no longer has the right to pick up where he left off, and resume prosecution of his application, so why should CTTC have the right to terminate pending finality? Under Hokeiko’s interpretation, if FCC approval occurred within nine months, but for some reason finality was delayed beyond twelve months, perhaps due to a third party objection after public notice, then CTTC could terminate the Settlement Agreement and avoid payment to Hokeiko. Since Hokeiko had not and could not timely preserve an appeal of the dismissal of his petition, Hokeiko would have no right to resume prosecution of his petition and would have received no compensation by CTTC, despite CTTC having received its bargain, though belatedly. In short, Hokeiko’s interpretation would render meaningless the “if approved” clause, as well as the “resume prosecution” clause.

Finally, at no time did the trial court explain why the interpretation offered by CTTC is unreasonable. Hokeiko’s only attempt to paint CTTC’s interpretation as unreasonable was his contention that CTTC’s interpretation imposes no limit on finality. Yet, Hokeiko did not deny

below that finality is generally perfunctory, and that had he not filed his appeal, the approval would have automatically become final within 45 days. Thus, Hokeiko's contention that CTTC's interpretation is unreasonable has no basis in reality if the parties are presumed to understand the FCC approval process.

IV. THE CONDITION PRECEDENT OF FINALITY WAS NOT INCLUDED FOR HOKEIKO'S BENEFIT.

In his brief on appeal, Hokeiko does not dispute the general legal premise that a party to a contract may waive the occurrence of a condition precedent imposed for his benefit, or the factual premise that CTTC waived the condition precedent of finality, and tendered payment of the settlement amount to Hokeiko prior to the effective date of Hokeiko's ten day termination notice. Instead, Hokeiko argues that the condition of finality was imposed for the mutual benefit of both parties. However in addressing this argument, Hokeiko confuses his right to terminate, with the benefit CTTC received by being assured of receiving a final FCC permit.

The concept underlying the settlement agreement is simple and can be garnered from the face of the Agreement. CTTC and Hokeiko were competing applicants for a construction permit. Hokeiko agreed to dismiss his competing application for the sum of \$65,000. CTTC, however, did not want to pay the \$65,000 settlement amount without the assurance of being awarded the construction permit by the FCC. CTTC's obligation to pay the settlement amount was therefore conditioned upon CTTC securing final FCC approval of its application.

The occurrence of the condition precedent of FCC approval clearly benefitted CTTC, since CTTC would, upon such approval, hold the construction permit. It is equally obvious that Hokeiko's expectation in entering into the agreement was that he was to receive the sum of \$65,000 for withdrawing his competing application. What is less obvious, and never explained by Hokeiko is what benefit he could conceivably receive by the fact that CTTC obtained FCC

approval of its construction permit, other than the fact that such approval would trigger CTTC's obligation to make the settlement payment.

In responding to this issue, Hokeiko confuses his termination rights, which existed for the benefit of both parties, with the occurrence of the conditions precedent. It is not disputed that both parties had the right to invoke the termination clause up until October 6, 1998, when the FCC approval issued, and thus the termination provision benefitted both parties. However, it is also true and undisputed that the termination did not occur automatically, but was only effective upon ten days notice. It is also undisputed that within the ten days after Hokeiko sent notice (assuming his right to terminate survived FCC approval), CTTC waived the remaining condition precedent of finality (having already received FCC approval) and tendered payment of the settlement amount (which tender was rejected), thereby rendering the agreement fully executed prior to the effective date of Hokeiko's termination.


Thus, CTTC did not seek to waive Hokeiko's termination rights, but rather to moot termination by consummating the agreement before the termination became effective. In the trial court below, Hokeiko presented no affidavit and no analysis which would support his bald contention that Hokeiko expected to receive a benefit from the condition precedent of finality, other than the fact the event triggered his right to payment. Since Hokeiko presented no evidence to support a finding by the trial court that the remaining condition precedent of finality was incorporated into the Settlement Agreement for Hokeiko's benefit, the trial court should have concluded as a matter of law, that CTTC had the right, and did in fact waive the condition of finality prior to the effective date of Hokeiko's termination notice. At the very least, the trial court should have reserved for trial the question of whether the conditions precedent were imposed for CTTC's exclusive benefit.

CONCLUSION

For the above reasons, CTTC respectfully requests that the court reverse the ruling of the trial court setting aside the order granting summary judgment in favor of Hokeiko and against CTTC, and remand the proceeding to the trial court with instructions to grant CTTC partial summary judgment declaring that the Settlement Agreement remains in full force and effect, and that Hokeiko acted in breach of the Settlement Agreement by its actions on October 8, 1997 before the FCC.

DATED this 8th day of August, 2000.

JONES, WALDO, HOLBROOK & McDONOUGH

By 
Jerome Romero
Attorneys for Appellants

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 8th day of August, 2000, I caused a true and correct copy of the foregoing APPELLANTS' REPLY BRIEF, to be mailed, postage prepaid, to the following:

Stephen Marshall
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Durham, Evans, Jones & Pinegar
111 East Broadway, Suite 900
Salt Lake City, UT 84111

A handwritten signature, likely of the sender, is written above a horizontal line.